Public Prosecutor v Jamil bin Jilap & Ors

HIGH COURT (SANDAKAN) — CRIMINAL APPEAL NO S41–02 OF 1999
RICHARD MALANJUM J
12 OCTOBER 1999

Criminal Procedure *— Prosecution — Right to conduct prosecution — Enactment gave Director of Forestry Department right to institute criminal proceedings; whether constitutional — Authorization by Public Prosecutor after institution of proceedings — Argument that Public Prosecutor could have intervene at any time — Whether any party apart from Public Prosecutor may be lawfully empowered to conduct prosecution — Federal Constitution art 145(3) — Forests Enactment 1968 (Sabah) s 40A*

The appellant instituted criminal prosecution against the respondents in the magistrates' court under s 30(1)(g) of the Sabah Forests Enactment 1968 ('the Enactment'). The respondents raised a preliminary objection that the prosecution was a nullity as it proceeded pursuant to s 40A of the Enactment which empowered the Director of the Forestry Department to institute criminal proceedings and that section should be ruled as unconstitutional as it was in contravention of art 145(3) of the Federal Constitution ('the Constitution'). The magistrate allowed the preliminary objection. The appellant appealed contending that s 40A of the Enactment should be given a wider interpretation to be understood as inclusive of the power to institute the instant proceeding by virtue of power bestowed upon the prosecuting officer. It was also contended that a wide interpretation of the section should be allowed since there was nothing to prevent the Public Prosecutor from intervening in the course of any prosecution under the Enactment. It was noted that the deputy public prosecutor issued a written authority pursuant to ss 376(iii) and 377(b) of the Criminal Procedure Code ('the Code') to the administrative officer with the Forestry Department to conduct prosecutions in the sessions and magistrates' courts in Sabah on 1 April 1998.

Held, dismissing the appeal:

(1) Section 40A of the Enactment was unconstitutional because it ran contrary to art 145(3) of the Constitution as the impugned section gave authority to the Director of the Forestry Department, inter alia, to institute criminal proceedings (see p 316B–C); *PP v Lee Ming & Anor* [1998] 4 MLJ 113 followed. Even though forestry was within the State List enshrined in the Ninth Schedule of the Constitution, it should not be read as overriding the effect of art 145(3) (see p 316C–D).

(2) The authorization that was given by the Public Prosecutor's office took place after the institution of the proceedings of this case. That meant that the institution of the proceedings by the Forestry

Department was made pursuant to s 40A of the Enactment and was thus a nullity (see pp 316I, 317C). A

(3) As there should be no room for any assumption when interpreting the provisions of the Constitution, the argument that the commencement of the prosecution should be taken as proper since the Public Prosecutor could have intervened at any time in the course of the proceeding was flawed. The issue was not so much of the power of the Public Prosecutor to intervene, rather it was the intended purpose of the impugned section in relation to art 145(3) of the Constitution, that was, a purported move to empower another authority to institute and conduct criminal prosecution in the face of the clear wordings of the Constitution (see p 317D–F). B C

[Bahasa Malaysia summary

Perayu telah memulakan dakwaan jenayah terhadap responden-responden di mahkamah majistret di bawah s 30(1)(g) Enakmen Hutan Sabah 1968 ('Enakmen tersebut'). Responden-responden membangkitkan bantahan awal bahawa pendakwaan adalah batal kerana ia dimulakan menurut s 40A Enakmen tersebut yang memberi kuasa kepada Pengarah Jabatan Perhutanan untuk memulakan prosiding-prosiding jenayah dan seksyen tersebut patut diputuskan sebagai tidak berperlembagaan kerana ia adalah bercanggah dengan perkara 145(3) Perlembagaan Persekutuan ('Perlembagaan'). Majistret membenarkan bantahan awal. Perayu telah merayu dengan menegaskan bahawa s 40A Enakmen tersebut patut diberikan tafsiaran yang lebih luas sebagai bermaksud termasuk kuasa untuk memulakan prosiding ini menurut kuasa yang diberi kepada pegawai pendakwaan. Adalah juga ditegaskan bahawa suatu penafsiran yang luas seksyen tersebut patut dibenarkan kerana tidak terdapat apa-apa untuk menghalang Pendakwa Raya daripada mencelah di dalam perjalanan pendakwaan di bawah Enakmen tersebut. Adalah juga diambil perhatian bahawa timbalan pendakwa raya telah mengeluarkan kuasa bertulis di bawah ss 376(iii) dan 377(b) Kanun Acara Jenayah ('Kanun tersebut') kepada pegawai pentadbiran di Jabatan Perhutanan untuk menjalankan pendakwaan-pendakwaan di mahkamah sesyen dan majistret di Sabah pada 1 April 1998. D E F G

Diputuskan, menolak rayuan tersebut: H

(1) Seksyen 40A Enakmen tersebut adalah tidak berperlembagaan oleh kerana ia bercanggah dengan perkara 145(3) Perlembagaan kerana seksyen yang dipersoalkan memberikan kuasa kepada Pengarah Jabatan Perhutanan, antara lain, untuk membawa prosiding jenayah (lihat ms 316B–C); *PP v Lee Ming & Anor* [1998] 4 MLJ 113 diikut. Walaupun perhutanan adalah di dalam Senarai Negeri seperti yang di peruntukkan di dalam Jadual I

A Kesembilan Perlembagaan Persekutuan, ia tidak patut dibaca sebagai mengatasi kesan Perkara 145(3) (lihat ms 316C–D).

(2) Kuasa yang diberikan oleh pejabat Pendakwa Raya telah berlaku selepas permulaan prosiding kes ini. Ini bermakna permulaan prosiding-prosiding tersebut oleh Jabatan Perhutanan dibuat
B menurut s 40A Enakmen tersebut dan adalah terbatal (lihat ms 316I, 317C).

(3) Oleh kerana tiada ruang untuk andaian semasa menafsirkan peruntukan-peruntukan Perlembagaan, hujahan bahawa permulaan pendakwaan sepatutnya dilihat sebagai wajar kerana
C Pendakwa Raya boleh mencelah pada bila-bila masa semasa perjalanan prosiding adalah cacat. Isu bukanlah sangat mengenai kuasa Pendakwa Raya untuk mencelah, tetapi ia adalah tujuan yang diniatkan seksyen yang dipersoalkan berkenaan dengan perkara 145(3) Perlembagaan, iaitu suatu tindakan yang bertujuan untuk memberi kuasa kepada suatu autoriti yang lain
D untuk memulakan dan menjalankan pendakwaan jenayah walaupun terdapat perkataan-perkataan yang jelas di dalam Perlembagaan (lihat ms 317D–F).]

Notes

E For a case on right to conduct prosecution, see 5 *Mallal's Digest* (4th Ed, 1997 Reissue) para 2277.

For cases on the Attorney General's power to institute, conduct or discontinue proceedings, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 1111–1114.

F

Cases referred to

Krishnan v PP [1987] 1 MLJ 292 (refd)
Long bin Samat & Ors v PP [1974] 2 MLJ 152 (refd)
G *PP v Lee Ming & Anor* [1998] 4 MLJ 113 (folld)
Repco Holdings Bhd v PP [1997] 3 MLJ 681 (refd)
Sjn Thomas a/l Manivello v Lt Kol Din Yati bin Dahlan & Ors [1998] 3 MLJ 329 (refd)

H **Legislation referred to**

Criminal Procedure Code (FMS Cap 6) ss 376(iii), 377(b), 380(ii)(b)
Federal Constitution art 145(3), Ninth Schedule (State List)
Forests Enactment 1968 s 40A (Sabah)
Forest Ordinance (Sarawak Cap 126) s 92A

I

Nur Aini Zulkifli (Deputy Public Prosecutor) for the appellant.
Haji Rahim bin Abdullah (*Rahim Abdullah & Co*) for the respondents.

Richard Malanjum J:

Introduction

On 7 October 1999, I dismissed the appeal by the Public Prosecutor against the decision of the learned magistrate allowing the preliminary objection of the learned counsel for the respondents. The objection was on the unconstitutionality of s 40A of the Sabah Forests Enactment 1968 ('the Enactment') thereby rendering the institution of the criminal prosecution against the respondents a nullity. In dismissing the appeal I indicated that I would give the reasons later. I do so now.

The charge

The charge preferred against the respondents reads as follows:

> Bahawa kamu pada 13 Mac 1997 lebih kurang jam 4.15 petang dengan niat dan tanpa sebarang hak sama ada dari sisi undang-undang ataupun kuasa yang sah didapati ada di dalam kawalan kamu sebanyak 524 batang balak yang mana cukai royalti berjumlah RM27,098.10 belum dibayar kepada Jabatan Perhutanan dan balak-balak tersebut sedang ditarik dengan menggunakan sebuah bot bernombor pendaftaran SN 197/4 di kawasan Laut Terusan Duyong di dalam Daerah Sandakan dan yang demikian telah melakukan kesalahan di bawah s 30(1)(g) Enakmen Hutan 1968 dan boleh dihukum di bawah s 30(2)(b) Enakmen Hutan yang sama.

At the outset of the hearing proper learned counsel for the respondents objected to the continuation of the proceeding on the ground that the prosecution was a nullity as it was proceeded pursuant to s 40A of the Enactment. And it was his contention that that section should be ruled as unconstitutional being in contravention of art 145(3) of the Federal Constitution ('the Constitution'). Such argument found favour with the learned magistrate relying on the decision in the case of *PP v Lee Ming & Anor* [1998] 4 MLJ 113 and *Repco Holdings Bhd v PP* [1997] 3 MLJ 681.

The appeal and contentions

Briefly it was the contention of the learned deputy prosecutor that s 40A of the Enactment should not be given a narrow interpretation but to be understood as inclusive of the power to institute the instant proceeding by virtue of the power bestowed upon the prosecuting officer thereof. It is to be noted that on 1 April 1998 the deputy public prosecutor issued a written authority pursuant to ss 376(iii) and 377(b) of the Criminal Procedure Code (FMS Cap 6) ('the Code') to one Mr Lester Daungkil, an administrative officer with the Forestry Department Sabah, to conduct prosecutions in the sessions courts and magistrate courts in Sabah. It was also argued that a wide interpretation to the said section should be allowed since there was nothing to prevent the Public Prosecutor from intervening in the course of any prosecution under the said Enactment.

For the respondents the argument as submitted in the lower court was repeated.

A *Finding*

For convenience, it is appropriate here that I should reproduce the impugned section and art 145(3) of the Constitution.

Section 40A reads:

B Power to prosecute and to institute legal action etc

(1) The Director may prosecute any offence or institute any action, suit or other proceedings relating to any matter under this Enactment.

(2) In any prosecution, action, suit or other proceedings to which this section applies, the director may appear personally or may be represented by the
C State Attorney-General, any legal officer of the State Attorney-General's Chambers or of the Forestry Department, or any authorised officer.

[En 8/98 wef 31 December 1998]

And art 145(3) of the Constitution states:

The Attorney General shall have power, exercisable at his discretion, to
D institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah court, a native court or a court-martial.

In *Lee Ming*'s case a similar situation also arose in that there the issue was on the constitutionality of a provision in the Sarawak Forest Ordinance 1958 s 92A. That section reads:

E Prosecution in respect of offences under this Ordinance or by: any subsidiary legislation made hereunder may be conducted by

(a) ...

(b) the director; or

(c) any forest officer or servant of the Government specially authorized in
F writing in that behalf of the director.

In declaring that provision unconstitutional the learned judge had this to say, at p 117D–E:

That provision is surely, in the light of *Repco Holdings Bhd v PP* [1997] 3 MLJ 681, which I respectfully follow, unconstitutional, null and void as it
G allows persons other than the Federal Attorney General to institute, conduct or discontinue any proceedings for an offence. Therefore, whatever the nature of the authorization that was given pursuant to that provision did not clothe the prosecution officer with authority to prosecute. In this regard, the learned sessions court judge was right in concluding that the prosecution was a nullity.

H And in reference to s 380(ii)(b) of the Code as a possible basis to say otherwise the learned judge in the same case at pp 119G–120A said this:

Whatever it is, art 145(3) of the Constitution again comes into play. Any provision which attempts to clothe any person other than the Federal Attorney General with the power to institute, conduct or discontinue any prosecution for an offence must necessarily fall foul of art 145(3). In this regard,
I s 380(ii)(b) which the prosecution relies on as allowing the prosecution officer to prosecute must be examined to see whether it falls foul of art 145(3). It is clear from the wording of s 380(ii)(b), which I have earlier reproduced, that

> the conduct of prosecution was taken totally out of the hands of the Federal Attorney General and vested in officers of Government department, local authority or statutory authority and there is not even a need to obtain sanction to prosecute from the Attorney General. It must follow from the decision of *Repco Holdings Bhd v PP* that s 380(ii)(b) is also unconstitutional and a nullity. Not only that, every legislation, be it State or Federal, which attempts to clothe any person other than the Federal Attorney General with the power to institute, conduct or discontinue any prosecution for an offence would also be unconstitutional and a nullity.

Now, in the instant case it is obvious that the impugned section of the Enactment gives authority to the director of the Forestry Department, inter alia, to institute criminal proceeding. That to my mind runs contrary to the clear provision of art 145(3) of the Constitution. As such as in *Lee Ming*'s case I would therefore rule that s 40A of the Enactment is unconstitutional.

No doubt forestry matter is within the State List as enshrined in the Ninth Schedule of the Constitution. But that should not be read as overriding the effect of art 145(3) thereof. Indeed in the case of *Long bin Samat & Ors v PP* [1974] 2 MLJ 152 at p 158, his Lordship Suffian LP clearly made this observation thus:

> On independence, the Federal Constitution came into force, and cl (3) of its art 145 (as amended) provides:
>
> > 'The Attorney General shall have power exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Muslim court, a native court or a court-martial.'
>
> In our view, this clause from the supreme law clearly gives the Attorney General very wide discretion over the control and direction of all criminal prosecutions. Not only may he institute and conduct any proceedings for an offence, he may also discontinue criminal proceedings that he has instituted, and the courts cannot compel him to institute any criminal proceedings which he does not wish to institute or to go on with any criminal proceedings which he has decided to discontinue (for the position in England, please see Viscount Dilhorne's speech at pp 32–3 in *Smedleys Ltd v Breed* [1974] 2 All ER 21). Still less then would the court have power to compel him to enhance a charge when he is content to go on with a charge of a less serious nature.
>
> Anyone who is dissatisfied with the Attorney General's decision not to prosecute, or not to go on with a prosecution or his decision to prefer a charge for a less serious offence when there is evidence of a more serious offence which should be tried in a higher court, should seek his remedy elsewhere, but not in the courts.

Accordingly, I find no basis to rely on any possible help that may appear to come by under the state list of the Ninth Schedule of the Constitution.

As regards the authorization given to Mr Lester Daungkil I would say that it did not assist the position of the prosecution. In the first place the institution of the criminal charge against the respondents took place on 5 February 1998 while the authority was only given on 1 April 1998. It should be understood that it was on 5 February 1998 that the criminal

proceeding was instituted. In the case of *Sjn Thomas a/l Manivello v Lt Kol Din Yati bin Dahlan & Ors* [1998] 3 MLJ 329, this is what his Lordship Shaik Daud JCA at p 333G said:

> Therefore, from these decided cases, we can come to the conclusion that a trial begins when the charge is read to the accused person and his plea taken but it only commences at the trial proper when the prosecution calls its first witness.

In the instant case when the trial began it was one Mr Raisun Abas who prosecuted and not Mr Lester Daungkil. However, there was no indication on the source of authority of Mr Raisun when he instituted the criminal proceeding. As such I can only conclude that it must be pursuant to s 40A of the Enactment. And that would make the institution of the proceeding a nullity in view of my finding on the legal position of the said section in relation to the Constitution.

On the averment that the commencement of the prosecution should be taken as proper even if it was instituted in the way as in this case since the Public Prosecutor could have intervened at any time in the course of the proceeding, with respect such argument ignored one basic fact, namely, that there should be no room for assumption when it comes to interpretation of any provision of the Constitution. More so when the provision is very clear as in this case. In fact it is not so much of the power of the Public Prosecutor to intervene. I do not think that can be questioned. Rather it is the intended purpose of the impugned section in relation to art 145(3) of the Constitution, that is, a purported move to empower another authority to institute and conduct criminal prosecution in the face of the clear wordings of the said article. Thus, for that reason I do not think there can be any question of prospective ruling as urged by the learned deputy. I am well aware of the possible inconvenience since there are several pending cases in the lower courts. But that should not be the reason to ignore an obvious provision of the Constitution. To do so would set a precedent whereby convenience would take precedence over the requirement of the law. That should never be allowed in particular in relation to the Constitution. And to that I recall what his Lordship Wan Sulaiman SCJ said on the importance of observing the basic requirement of the law in the case of *Krishnan v PP* [1987] 1 MLJ 292 at p 295H–296A:

> It is one of the most basic rules of justice that however heinous a crime a person is accused of whatever the rank of the person who testifies against him, he can only be convicted on evidence produced according to the stringent requirements of the law. It cannot be questioned that the offence of trafficking is a very serious one, the gravity of which is reflected in the sentence, in this case the sentence of death. But it does not mean that a person accused of one of the most serious crimes known to our law is not entitled to equal protection before the law and one of those items of protection to which he is entitled is that his guilt must be proved in accordance with or in a manner required by law. Anything less will not be enough.

Conclusion

For the reasons hereinabove that I dismissed the appeal of the prosecution against the discharge not amounting to acquittal of the respondents on the charge preferred against them. But I must add here that there is nothing to prevent the prosecution from commencing a fresh charge against the respondents without relying on the provision of s 40A of the Enactment.

Appeal dismissed.

Reported by Chin En Tek